IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.2170 OF 2006

Ravindra Vasant Shinde
(legal heir of V.G.Shinde) .. Petitioner

Versus

Narsinha Narayan Shirodkar & ors .. Respondents

Mr.Ambar Joshi for petitioner
Mr.C.S.Joshi for respondents

CORAM : P.V.KAKADE, J.
DATE : 4th APRIL, 2006

P.C.:

1. Heard the learned counsel for both the parties. Perused the record.

2. Rule, rule made returnable forthwith by consent.

3. The petitioner has challenged the order dated 15.2.2006 passed by the Joint Civil Judge, Senior

Division, Thane rejecting the application to seek witness summons in respect of the witness in support of his case, which was the order passed below Exh.167 in Misc. Application No.798/96.

4. By submitting the application the petitioner intended to examine one Jaysing Kumbhar as his witness on submission that his own witness has disclosed that the structure of the building was inspected by said Kumbhar in the year 1996 and gave opinion that the structure was in dilapidated condition. It was further submitted that the said Kumbhar had prepared report of inspection of the property and therefore, summons was sought for to produce the said report and to examine the said Kumbhar as witness of the petitioner. The other party challenged the application and after hearing both the parties the trial court was of the view that the report was submitted in the court already and therefore, it was not acceptable that the report was in custody of the said witness. The application was also rejected on the ground that the application is filed by the petitioner under Section 17 of the Bombay Rent Act and therefore, it was held that the report or the evidence of which the opponent intended to lead is not sufficient for final adjudication of the

application. In my considered view, that the entire approach of the trial court is erroneous.

4. Firstly, it was to be noted that it is the party to decide how much evidence which should be presented before the court in order to support his contention sought to be established. Moreover, both the parties admitted that the report of the said Kumbhar is not on record and therefore, while passing the order the trial court had committed factual error by recording that the report is already submitted in the court and it is not in custody of witness and witness need not be summoned. The learned counsel for the respondent submitted that there was no mention of examination by intended witness Kumbhar of the property in the written statement and therefore, it would amount to introduction of a new case different from and not contained in written statement. In support of this submission the learned counsel for the respondent sought to put reliance of the Single Judge ruling of this Court in **Haren Krishnakumar Mehta vs. Kamla Pribhdas Nebhanani reported in 2001(2) ALl MR 67** wherein it was held that defendant making a new case different from and not contained in written statement and therefore, under the circumstances the defendant cannot be permitted to

prove a new case without pleadings in that regard. On perusal of the facts and circumstances involved in the said ruling, I have no doubt it is not applicable to the present case. Herein the petitioner is not trying to make out a new case but seek to shelter of his defence which is already taken in the written statement. It is a fact that he has come with the case that the suit structure was in dilapidated condition, which is also an evident position. Therefore, if the petitioner wants to lead further evidence in this regard, the party cannot be stopped at the threshold by summoning the witness for the said purpose. No doubt it is upon the court after examining such witness to appreciate the value of the evidence of the report as well as the witness and it is at liberty to discard it if it is found either it is admissible or irrelevant for the purpose of adjudicating the dispute on merits. However, party cannot be stopped from summoning the witness if it is obvious that evidence is sought to be brought on record is relevant for the purpose of effective adjudication of dispute between the parties. The court cannot shut its door at the threshold by holding that since the matter is under Section 17 of the Bombay Rent Act, the evidence would be of no use. It would be just and proper to the trial court to record its

finding on that point after recording of the evidence of the witness after summoning him on the request of the petitioner.

5. In the result, rule is made absolute. The Petition is allowed in terms of prayer clause (a). The order passed by Civil Judge, Senior Division, Thane dated 15.2.2006 below Exh.167 in Misc. Application No.798 of 1996 is set aside. The court is directed to issue summons for the evidence of the witness as well as production of the report on suitable date to be fixed and pursue with the matter according to law. With these directions the petition stands disposed of with no order as to costs.